A **BADAN PENGURUSAN TIARA DUTA**

v.

TIMEOUT RESOURCES SDN BHD

B COURT OF APPEAL, PUTRAJAYA
MOHAMAD ARIFF YUSOF JCA
MAH WENG KWAI JCA
DAVID WONG DAK WAH JCA
[CIVIL APPEAL NO: W-02(NCVC)(W)-1506-07-2013]
C 29 APRIL 2014

CONTRACT: *Breach - Agreement - Whether agreement null and void - Whether agreement ultra vires Building and Common Property (Maintenance and Management) Act 2007 - Whether appellant had*
D *power to enter into agreement - Whether former chairman and secretary authorised to sign agreement on behalf of appellant - Whether evidence tendered to show authority of signatories - Whether respondent informed of lack of authority by signatories of agreement - Whether agreement properly entered into*

E ***CONTRACT:*** *Termination - Validity - Lease agreement - Whether breach of terms of agreement proven - Allegation of default in payment of rental - Inability to renew licence - Whether respondent's payment of rental rightly stopped - Whether notice of termination pursuant to*
F *agreement proper and valid*

LAND LAW: *Lease - Lack of registration - Whether rendered lease void - Whether vest interest in lessee - Whether good and valid as agreement for lease - Whether enforceable in equity by decree of specific performance - National Land Code, ss. 43, 221, 433(B)*

G

The appellant is a Joint Management Body ('JMB') incorporated under the Building and Common Property (Maintenance and Management) Act 2007 ('the Act') which came into force on 12 April 2007. The appellant maintains and manages, *inter alia*, the
H premises known as 'Tiara Duta Clubhouse and Restaurant and Car Parks' ('the premises') being common property in a condominium development known as Tiara Duta Condominium ('the property'). The appellant appointed a Joint Management Committee ('JMC') to perform its duties and conduct business on
I its behalf. The respondent and the appellant entered into an agreement for the lease of the premises for a period of five years with an option to renew for a further period of five years

('the first agreement'). SP2 and SP3, the former chairman and former secretary of the appellant, respectively, signed the first agreement on behalf of the appellant. Subsequently, the first agreement was substituted by a second agreement upon almost the similar terms and conditions for a period of ten years and increased rental for the first two years and thereafter with an increase of 10% annually from the third to the tenth year. The first and second agreements were not registered as a lease under Part 15 of the National Land Code ('NLC'). It was also an agreed term of the agreement that the restaurant would be open to the residents of Tiara Duta Condominium as well as to members of the public. Before the second agreement came into effect, possession of the premises was handed over to the respondent by the appellant to enable the respondent to carry out renovation works before the commencement of business. In order to carry on the business, the respondent had applied for and obtained a business licence from Majlis Perbandaran Ampang Jaya ('MPAJ') for year ending 31 December 2012. Sometime in November 2012, the respondent applied to MPAJ for a renewal of its business licence for 2013. The respondent was informed by MPAJ to obtain a letter of support from the appellant in respect of the agreement entered into between the appellant and the respondent. The respondent wrote to the appellant requesting for the letter of support. However, the appellant declined to give the letter of support to the respondent on the ground that it was not obliged to do so under the terms and conditions of the agreement. In consequence, the respondent was not able to obtain its business licence for 2013 and had to stop its business operations. The respondent therefore claimed against the appellant for breach of the agreement and prayed for an order of specific performance, for the appellant to issue a letter to MPAJ within 14 days from the date of judgment to support the respondent's application for a renewal of its business licence and for damages. The appellant in turn counterclaimed for vacant possession of the premises and for damages to be assessed on the ground that the respondent had breached the terms of the agreement and had defaulted in the payment of rental. The appellant had given notice of termination of the agreement to the respondent pursuant to cl. 10.1(a) and (b) of the agreement. After a full trial, the trial judge allowed the respondent's claim for an order of specific performance, general damages only and interest and dismissed the counterclaim.

A B C D E F G H I

A Being dissatisfied with the decision of the trial judge, the appellant appealed to the Court of Appeal against the order allowing the claim and the order dismissing the counterclaim. The main thrust of the appellant's submission was that the agreement was *ultra vires* the Act and therefore null and void as the appellant did not
B have the power to enter into the agreement to lease the premises to the respondent. The issues raised for the court's determination were, *inter alia*, (i) whether the agreement was validly signed by both the former chairman ('SP2') and secretary ('SP3') of the appellant; (ii) whether the appellant was obliged to give a letter of
C support to the respondent; (iii) whether the respondent was in breach of the agreement; and (iv) the effect of the agreement not being a registered lease.

Held (dismissing appeal with costs)

D **Per Mah Weng Kwai JCA delivering the judgment of the court:**

(1) Based on the minutes of the meetings, SP2 and SP3 were fully authorised to deal with the respondent and to enter into
E the agreements, albeit no resolution was passed by the appellant specifically for this purpose. In any event, the internal management rule must apply in the present circumstances. The respondent was a third party to the internal management of the appellant and was not put on
F notice at any time to inquire into the authority, or the lack of it, of SP2 and SP3 to enter into the agreements. Thus, it was not wrong for the respondent to assume that everything was in order and that it was proper for SP2 and SP3 to have signed the agreements. (para 24)

G **(2)** The second agreement was in fact a 'replacement' of the first agreement and the first agreement would apply *mutatis mutandis* to the second agreement. The second agreement was lawfully and properly entered into by SP2 and SP3 on behalf of the appellant. Further, there were no minutes of meetings
H of the JMC nor any resolution passed was tendered in evidence to show that SP2 and SP3 were no longer authorised to enter into the second agreement. (para 24)

(3) Although there was no express provision in any of the terms
I of the agreements that the appellant was obliged to furnish a letter of support to the respondent to facilitate the

respondent's application for a renewal of its business licence for 2013, there was an implied obligation on the part of the appellant to do so. It is trite that parties to an agreement must do such acts as are necessary to preserve the integrity of the agreement and to ensure due performance of the agreement by all parties concerned. It was not wholly unforeseeable that the appellant's refusal to give its letter of support would delay and prejudice the respondent in its application. (para 24)

(4) There did not seem to have been any proven breach or breaches committed by the respondent right up to 31 December 2012. The respondent had stopped paying rental to the appellant after it had failed to renew its business licence for 2013 by reason of the appellant's failure to furnish the letter of support. Thus, the notice of termination dated 21 December 2012 by the appellant under cl. 10.1(a) and (b) of the second agreement and the claim for vacant possession in the said notice was not a proper and valid notice of termination of the lease. (para 24)

(5) The agreement to let out the premises for the initial period of five years would come within the meaning of a lease in s. 221 of the NLC, although it was not registered. The lease was in favour of the respondent, a body capable of taking a lease within the meaning of ss. 43 and 433(B) of the NLC. However, a lease will only have legal effect upon the registration of an instrument in Form 15A of the NLC. An unregistered lease, although void as a lease and will not have the effect of vesting an interest in the lessee, is still good and valid as an agreement for a lease and is enforceable in equity by a decree of specific performance. Thus, the respondent was quite correct to pray for the enforcement of the agreement as an agreement for a lease by way of a decree of specific performance. (para 24)

(6) In the absence of any specific provision spelling out expressly the power to sell, lease or rent out common property in s. 8(2) of the Act, it can be implied that the leasing out of common property by a JMB can come within the ambit of s. 8(2)(g). The appellant saw it fit in 2011/2012 to lease the premises to the respondent. Therefore, the members not only had the benefit of the use of the restaurant but the JMB was

also able to collect rental of at least RM9,000 per month from the respondent. The rentals collected would no doubt accrue for the benefit and enjoyment of the members of the JMB. (paras 28 & 30)

(7) One of the main duties of a JMB as set out in s. 8(1) of the Act, was to look after the welfare of its members in their enjoyment of the common property. Thus, the leasing of the premises by the appellant was the doing of something reasonably necessary for the performance of its duties under the Act. Based on the general provision in s. 8(2)(g) of the Act, there was no reason or basis to declare the agreement to lease out the common property null and void for being *ultra vires* the Act. (paras 31 & 32)

Bahasa Malaysia *Translation Of Headnotes*

Perayu adalah Badan Pengurusan Bersama ('BPB') yang diperbadankan di bawah Akta Bangunan dan Harta Bersama (Penyelenggaraan dan Pengurusan) 2007 ('Akta') yang berkuatkuasa pada 12 April 2007. Perayu menyelenggara dan menguruskan, antara lain, premis yang dikenali sebagai 'Tiara Duta Clubhouse and Restaurant and Car Parks' ('premis tersebut') iaitu hartanah bersama di pembangunan kondominium yang dikenali sebagai Tiara Duta Condominium ('hartanah'). Perayu melantik Jawatankuasa Pengurusan Bersama ('JPB') untuk melaksanakan tanggungjawabnya dan menjalankan perniagaan bagi pihaknya. Responden dan perayu memasuki perjanjian bagi pajakan premis bertempoh lima tahun dengan pilihan untuk memperbaharuinya bagi tempoh lanjut selama lima tahun ('perjanjian pertama'). SP2 dan SP3, masing-masing bekas pengerusi dan setiausaha perayu, menandatangani perjanjian pertama bagi pihak perayu. Kemudian, perjanjian pertama digantikan dengan perjanjian kedua berdasarkan terma-terma dan syarat-syarat yang hampir serupa bagi tempoh sepuluh tahun dan kenaikan sewaan bagi dua tahun pertama dan selepas itu, dengan peningkatan 10% setiap tahun dari tahun ketiga hingga kesepuluh. Perjanjian pertama dan kedua tidak didaftarkan sebagai pajakan di bawah Bahagian 15 Kanun Tanah Negara ('KTN'). Turut menjadi terma perjanjian yang dipersetujui bahawa restoran akan terbuka kepada residen-residen Tiara Duta Condominium serta orang awam. Sebelum perjanjian kedua berkuatkuasa, hak milik premis diserahkan kepada responden oleh perayu untuk membolehkan responden menjalankan kerja-kerja pengubahsuaian sebelum

bermulanya perniagaan. Untuk menjalankan perniagaan, responden telah memohon dan mendapatkan lesen perniagaan daripada Majlis Perbandaran Ampang Jaya ('MPAJ') untuk tahun berakhir 31 Disember 2012. Kira-kira pada November 2012, responden memohon kepada MPAJ bagi pembaharuan lesen perniagaannya untuk tahun 2013. Responden dimaklumkan oleh MPAJ untuk mendapatkan surat sokongan daripada perayu bagi perjanjian yang dimasuki antara perayu dan responden. Responden menulis kepada perayu memohon surat sokongan. Walau bagaimanapun, perayu menolak untuk memberi surat sokongan kepada responden atas alasan bahawa ia tidak berkewajipan untuk berbuat sedemikian di bawah terma-terma dan syarat-syarat perjanjian. Akibatnya, responden tidak berjaya mendapatkan lesen perniagaan bagi tahun 2013 dan terpaksa memberhentikan operasi perniagaannya. Responden dengan itu, menuntut daripada perayu bagi pelanggaran perjanjian dan memohon perintah pelaksanaan spesifik agar perayu mengeluarkan surat kepada MPAJ dalam 14 hari daripada tarikh penghakiman untuk menyokong permohonan responden bagi pembaharuan lesen perniagaan dan ganti rugi. Perayu sebaliknya menuntut balas bagi milikan kosong premis dan agar ganti rugi ditaksir atas alasan bahawa responden telah melanggar terma-terma perjanjian dan mungkir dalam pembayaran sewa. Perayu telah memberi notis penamatan perjanjian kepada responden di bawah kl. 10.1(a) dan (b) perjanjian. Selepas perbicaraan penuh, hakim bicara membenarkan tuntutan responden bagi perintah pelaksanaan spesifik, ganti rugi am sahaja dan faedah dan menolak tuntutan balas. Tidak berpuas hati dengan keputusan hakim bicara, perayu merayu kepada Mahkamah Persekutuan terhadap perintah membenarkan tuntutan dan perintah menolak tuntutan balas. Tunjang utama hujahan perayu adalah bahawa perjanjian tersebut adalah *ultra vires* Akta dan oleh itu, batal dan tidak sah kerana perayu tidak mempunyai kuasa untuk memasuki perjanjian untuk memajak premis kepada responden. Isu-isu yang dibangkitkan bagi pemutusan mahkamah adalah, antara lain, (i) sama ada perjanjian telah ditandatangani secara sah oleh kedua-dua bekas pengerusi ('SP2') dan setiausaha ('SP3') perayu; (ii) sama ada perayu berkewajipan memberikan surat sokongan kepada responden; (iii) sama ada responden melanggari perjanjian; dan (iv) kesan perjanjian akibat pajakan tidak berdaftar.

A B C D E F G H I

Diputuskan (menolak rayuan dengan kos)
Oleh Mah Weng Kwai HMR menyampaikan penghakiman mahkamah:

(1) Berdasarkan minit mesyuarat, SP2 dan SP3 berkuasa penuh untuk menangani responden dan memasuki perjanjian-perjanjian tersebut, walaupun tiada resolusi yang diluluskan oleh perayu khusus bagi tujuan tersebut. Dalam apa jua keadaan, peraturan pengurusan dalaman mestilah terpakai dalam hal keadaan ini. Responden adalah pihak ketiga kepada pengurusan dalaman perayu dan tidak diberi notis pada bila-bila masa untuk menanyakan mengenai kuasa, atau kekurangannya, oleh SP2 dan SP3 untuk memasuki perjanjian-perjanjian. Oleh itu, adalah tidak salah bagi responden untuk menganggap bahawa semuanya dalam keadaan teratur dan adalah betul untuk SP2 dan SP3 menandatangani perjanjian-perjanjian tersebut.

(2) Perjanjian kedua sebenarnya adalah 'gantian' kepada perjanjian pertama dan perjanjian pertama akan terpakai secara *mutatis mutandis* kepada perjanjian kedua. Perjanjian kedua dimasuki secara sah dan teratur oleh SP2 dan SP3 bagi pihak perayu. Selanjutnya, tidak terdapat minit mesyuarat JPB mahupun sebarang resolusi yang diluluskan yang dikemukakan sebagai keterangan untuk menunjukkan bahawa SP2 dan SP3 tidak lagi berkuasa untuk memasuki perjanjian kedua.

(3) Walaupun tiada peruntukan jelas dalam apa jua terma perjanjian bahawa perayu berkewajipan memperuntukkan surat sokongan kepada responden untuk membantu dalam permohonan responden untuk memperbaharui lesen perniagaan bagi 2013, terdapat kewajipan tersirat di pihak perayu untuk berbuat sedemikian. Adalah matan bahawa pihak-pihak dalam perjanjian mestilah mengambil langkah-langkah untuk mengekalkan integriti perjanjian dan untuk memastikan pelaksanaan wajar perjanjian-perjanjian pihak-pihak yang terlibat. Ia bukanlah tidak boleh dijangka sepenuhnya bahawa penolakan perayu untuk memberikan surat sokongan akan melengahkan dan memprejudiskan responden dalam permohonannya.

(4) Kelihatannya tidak ada pelanggaran atau pelanggaran-pelanggaran yang dilakukan oleh responden hingga 31 Disember 2012 telah dibuktikan. Responden telah berhenti daripada membayar sewa kepada perayu selepas ia gagal

memperbaharui lesen perniagaan bagi tahun 2013 atas alasan kegagalan perayu menyediakan surat sokongan. Oleh itu, notis penamatan bertarikh 21 Disember 2012 oleh perayu di bawah kl. 10.1(a) dan (b) dalam perjanjian kedua dan tuntutan bagi milikan kosong dalam notis tersebut bukanlah notis penamatan pajakan yang betul dan sah.

(5) Perjanjian untuk menyewakan premis bagi tempoh asal selama lima tahun akan terjumlah di bawah maksud pajakan dalam s. 221 KTN, walaupun ia tidak didaftarkan. Pajakan berpihak kepada responden, satu badan yang mampu mengambil pajakan dalam maksud ss. 43 dan 433(B) KTN. Walau bagaimanapun, satu-satu pajakan hanya akan mempunyai kesan undang-undang dengan pendaftaran instrumen dalam Borang 15A KTN. Pajakan yang tidak berdaftar, walaupun tidak sah sebagai pajakan dan tidak akan mempunyai kesan memberi kepentingan kepada penerima pajak, adalah sah sebagai perjanjian untuk pajakan dan boleh berkuatkuasa dalam ekuiti melalui dekri pelaksanaan spesifik. Oleh itu, responden agak betul dalam memohon bagi pelaksanaan perjanjian tersebut sebagai perjanjian bagi pajakan melalui dekri pelaksanaan spesifik.

(6) Tanpa peruntukan khusus yang menggariskan secara jelas kuasa untuk menjual, memajak atau menyewakan harta bersama dalam s. 8(2) Akta, boleh disiratkan bahawa memajak hartanah bersama oleh BPB boleh terjumlah di bawah ruang lingkup s. 8(2)(g). Perayu merasakan adalah sesuai, pada tahun 2011/2012 untuk memajakkan premis kepada responden. Oleh itu, ahli-ahli bukan sahaja mendapat manfaat penggunaan restoran tetapi BPB jugak boleh mengutip sewa lebih kurang RM9,000 sebulan daripada responden. Sewa-sewa yang dikutip akan, tanpa ragu-ragu, terakru bagi manfaat dan nikmat ahli-ahli BPB.

(7) Salah satu daripada tanggungjawab BPB seperti yang dinyatakan dalam s. 8(1) Akta, adalah untuk menjaga kebajikan ahli-ahlinya dalam menikmati harta bersama. Oleh itu, pajakan premis oleh perayu adalah melakukan sesuatu yang secara munasabahnya perlu bagi pelaksanaan tanggungjawabnya di bawah Akta. Berdasarkan peruntukan am di bawah s. 8(2)(g) Akta, tiada alasan atau sebab untuk mengisytiharkan perjanjian pajakan hartanah bersama tersebut adalah tidak sah dan batal kerana *ultra vires* Akta.

Case(s) referred to:

Bumiputra-Commerce Bank Bhd v. Augusto Pompeo Romei & Anor [2013] 1 LNS 1235 CA ***(refd)***

Majlis Peguam Malaysia & Ors v. Raja Sekaran Krishnan & Other Appeals [2004] 4 CLJ 239 CA ***(refd)***

Malaysia Shipyard & Engineering Sdn Bhd v. Bank Kerjasama Rakyat (M) Bhd [1985] 2 CLJ 427; [1985] CLJ (Rep) 206 SC ***(refd)***

Margaret Chua v. Ho Swee Kiew & Ors [1961] 1 LNS 61 HC ***(refd)***

Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors [1998] 1 CLJ 793 FC ***(refd)***

Royal British Bank v. Turquand [1856] 119 ER 474 ***(refd)***

Legislation referred to:

Building and Common Property (Maintenance and Management) Act 2007, ss. 8(1), (2)(a), (b), (c), (d), (e), (f), (g), (h), (i), 11(1)

Contracts Act 1950, s. 66

National Land Code, ss. 43, 221, 433(B)

For the appellant - Tang Kim Choong (Mohammad Shafiee Afendi with him); M/s KC Tang & Co

For the respondent - Azwan Abdul Wahab; M/s Dzahara & Assocs

[Appeal from High Court, Kuala Lumpur; Civil Suit No: 22NCVC-20-01-2013]

Reported by Emm Zehra

JUDGMENT

Mah Weng Kwai JCA:

The Parties

[1] The appellant is a joint management body (JMB) incorporated under the Building and Common Property (Maintenance and Management) Act 2007 (the Act) which came into force on 12 April 2007. The appellant maintains and manages *inter alia*, the premises known as "Tiara Duta Clubhouse and Restaurant and Car Parks" (the premises) being common property in a condominium development known as Tiara Duta Condominium located at Persiaran Putra, Taman Putra Sulaiman, Ampang, Selangor (the property).

[2] The appellant has appointed a joint management committee (JMC) to perform its duties and conduct business on its behalf. (Section 11(1) of the Act).

[3] To date, a management corporation has not been formed as less than 25% of the owners of the property have registered the transfer of the strata titles from the developer to themselves.

[4] The respondent is a company incorporated under the Companies Act 1965.

The Agreements

[5] On 18 July 2011, a written agreement (the first agreement) (rekod rayuan, jld 3, p. 417) was entered into between the respondent and the appellant for the lease of the premises for a period of five years, with effect from 1 July 2011, with an option to renew for a further period of five years, at the rental of RM5,000 per month for the first five-year period.

[6] On behalf of the appellant, the first agreement was signed by Hj M Isa bin Halihan (SP2), its former Chairman and Hjh Haizan bt Abdul Rahman (SP3) its former secretary.

[7] The first agreement was signed by Syed Abd Rahman Syed Akil on behalf of the respondent.

[8] The first agreement was substituted by a second agreement dated 30 April 2012 (rekod rayuan, jld 3, p. 443) entered into between the same parties upon almost similar terms and conditions for a period of ten years with effect from 1 April 2012 and with an option to renew for another ten years. The rental was increased to RM9,000 per month for the first two years and thereafter with an increase of 10% annually from the third to the tenth year.

[9] For purposes of this appeal, references to "agreement and/or lease" shall refer to the second agreement as being the agreement in issue, unless specifically referred to as the first agreement or second agreement.

[10] Both the first and second agreements were not registered as a lease under Part 15 of the National Land Code.

[11] It was an agreed term of the agreement that the restaurant would be open to the residents of Tiara Duta Condominium as well as to members of the public.

A **The Problem**

[12] Prior to 1 April 2012 possession of the premises was handed over to the respondent by the appellant to enable the respondent to carry out renovation works before the commencement of
B business on 1 April 2012.

[13] In order to carry on the business, the respondent had applied for and obtained a Lesen Perniagaan from Majlis Perbandaran Ampang Jaya (MPAJ) for year ending 31 December 2012.
C

[14] Sometime in November 2012, the respondent applied to MPAJ for a renewal of its Lesen Perniagaan for 2013. The respondent was informed by MPAJ to obtain a letter of support (surat sokongan) from the appellant in respect of the agreement
D entered into between the appellant and the respondent. On 3 December 2012 the respondent wrote to the appellant requesting for the letter of support.

[15] The appellant declined to give the letter of support to the
E respondent on the ground that it was not obliged to do so under the terms and conditions of the agreement.

[16] In consequence, the respondent was not able to obtain its Lesen Perniagaan for 2013 and had to stop its business operations.
F

The Claim And Counter-claim

[17] The respondent's claim against the appellant was for breach of the agreement and prayed for an order of specific performance,
G with the appellant issuing a letter to MPAJ within 14 days from the date of judgment to support the respondent's application for a renewal of its Lesen Perniagaan and for damages.

[18] The appellant in turn counter-claimed for vacant possession of the premises and for damages to be assessed on the ground
H that the respondent had breached the terms of the agreement (as pleaded in para. 11.1 to para. 11.13 of the defence and counter-claim) and had defaulted in the payment of rental. The appellant had given notice of termination of the agreement to the
I respondent pursuant to cls. 10.1(a) and (b) of the agreement. (See rekod rayuan, jld 3, p. 480).

Decision Of The High Court

[19] After a full trial, the learned trial judge allowed the respondent's claim for an order of specific performance, general damages only and interest and dismissed the counter-claim. Costs of RM35,000 was ordered to be paid by the appellant in the claim and counter-claim.

Appeal By The Appellant

[20] Being dissatisfied with the decision of the learned trial judge, the appellant filed its notice of appeal to the Court of Appeal against the order allowing the claim and the order dismissing the counter-claim.

Hearing Of The Appeal

[21] Upon reading the record of appeal, the written submissions of counsel for the appellant and the respondent and upon hearing the oral submissions of counsel aforesaid, the court on 31 October 2013, decided to reserve judgment and to deliver its decision on a date to be fixed.

Decision Of This Court

[22] After a careful consideration of the evidence and the several interesting points of law raised by counsel for appellant, the court is of the view that there are no merits in the appeal and accordingly the appeal is dismissed with costs.

Grounds Of Decision

[23] The main thrust of the appellant counsel's submission was that the agreement was *ultra vires* the Act and therefore null and void as the appellant did not have the power to enter into the agreement to lease the premises to the respondent.

[24] But before we delve into and deal with the substantive arguments on this point of law, the following issues will also have to be determined by the court. They are namely:

(i) whether the agreement was validly signed by both the former Chairman and secretary of the appellant;

(ii) whether the appellant was obliged to give a letter of support to the respondent;

(iii) whether the respondent was in breach of the agreement; and

(iv) the effect of the agreement not being a registered lease.

Issue 1 – Whether The First And Second Agreements Were Validly Signed By Both The Former Chairman And Secretary Of The Appellant

(i) The appellant's contention was that the former Chairman Hj M Isa bin Halihan (SP2) and the Secretary Hajah Haizan bte Abdul Rahman (SP3) were not clothed with the proper authority to have validly executed the first and second agreements on behalf of the appellant that is, they did not have the mandate of the appellant to do so.

(ii) From the circumstances of this case, it is apparent to the court that there are differences between the present Chairman and his committee and SP2 and SP3 over the maintenance and management of the premises. It was the appellant's contention that as SP2 and SP3 were not mandated to sign the first and second agreements, they had done so wrongfully and on a frolic of their own and as such the agreements could not be binding on the appellant.

(iii) With respect, in our judgment we are of the view that there is absolutely no basis at all to support this argument. We say so for the following reasons:

(a) The respondent was a stranger to the appellant before 2011. It was only sometime in early 2011 that the respondent, in answer to an advertisement placed by the appellant, became interested in the premises and began business negotiations with the appellant.

(b) The first meeting of the JMC for 2011/2012 was held on 19 May 2011. At this meeting, the committee had discussed the issue of leasing the restaurant at the Clubhouse to the respondent.

(c) At the second meeting of the JMC for 2011/2012 held on 13 July 2011 attended by SP2, SP3 and five members including Melvin Cheah, the present Chairman of the appellant, the minutes of the first meeting were confirmed and the decision to lease the restaurant at the Clubhouse to the respondent was ratified. It is pertinent to set out

verbatim what was ratified by the committee on 13 July 2011. The minutes appearing in rekod rayuan (jld 3) at p. 532 read:

i. The restaurant at the Club House is leased out to Time-Out Resources Sdn. Bhd. for a 5-year period commencing on 1st July 2011 with a renewal option of another 5 years;

ii. The company will operate a food court (sub-let basis) and restaurant at the demised premises, and will also offer event management services;

iii. Rental for the first 24 months is RM5,000 per month with a 10% increment for every subsequent year. However, rental is waived for the first 2-month renovation period (1st July to 31 August 2011);

iv. The operator will share its revenue with BPTD at the rate of 10% of net monthly profit or RM1,500 per month, whichever is higher; and

v. The operator shall do its own renovation of the premises (in consultation with BPTD) and shall also provide its own cleaning service and security.

From the above, it will be noted that SP2 and SP3 were fully authorised to deal with the respondent and to enter into the first and second agreements that they did on behalf of the appellant, *albeit* it is recognised that no resolution was passed by the appellant specifically for this purpose at the second meeting of the JMC. Further it would appear that no EGM was convened to authorise SP2 and SP3 to sign the first agreement.

It is entirely strange that Melvin Cheah and the others should now object to the agreements when in fact they were party to the decision taken on 13 July 2011 to lease out the premises. Further, there is nothing on record to show that the JMC was not agreeable to the lease as a whole or to any of the terms therein.

(d) Following the ratification of the decision on 13 July 2011, SP2 and SP3 proceeded to sign the first agreement with the respondent on 18 July 2011, with the lease commencing on 1 July 2011. The minutes of the second meeting of the JMC and the first agreement are

A contemporaneous documents and there is nothing to suggest that either of them is improper or has been connived.

(e) It will be noted that the minutes of meeting referred to above are the minutes of meeting of the JMC and not of the appellant. However as the JMC had been appointed by the JMB to carry out its duties and functions, it is obvious that the appellant as the JMB and the principal had adopted and approved all that had been done by the JMC.

(f) In any event, the internal management rule must apply in the present circumstances. The respondent is a third party to the internal management of the appellant and was not put on notice at any time to inquire into the authority, or the lack of it, of SP2 and SP3 to enter into the agreements. Thus, it was not wrong for the respondent to assume that everything was in order and that it was proper for SP2 and SP3 to have signed the agreements.

(g) In *Royal British Bank v. Turquand* [1856] 119 ER 474 it was held that "persons contracting with a company and dealing in good faith may assume that acts within its constitution and powers have been properly and duly performed, and are not bound to inquire whether acts of internal management have been regular".

The *Turquand*'s Rule would, in our view similarly apply to this case, even though the appellant is not a company incorporated under the Companies Act 1965.

(iv) In the case of *Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors* [1998] 1 CLJ 793, it was similarly held by Edgar Joseph Jr FCJ that "the effect of the *Turquand* Rule is that it reduces the enquiries which outsiders having dealings with a company must take. Such outsiders have no right to insist on proof by the company's directors that the provisions of its memorandum and articles have been complied with, and they cannot therefore be deemed to have constructive notice of some failure to comply which they have no means of discovering."

See also the recent decision of the Court of Appeal in *Bumiputra-Commerce Bank Bhd v. Augusto Pompeo Romei & Anor* [2013] 1 LNS 1235; [2014] AMEJ 0118.

(v) A crucial point to note in this case is that the respondent was not put upon inquiry on the want of authority on the part of SP2 and SP3. The respondent could therefore presume that things were rightly done within the appellant. The respondent, as an outsider, is entitled to enforce the agreement as it had acted in good faith and without notice that the authority was allegedly being abused.

(vi) The second agreement was in fact a "replacement" of the first agreement upon the same terms and conditions, save for the duration of the lease and the increased monthly rental. The court's observations on the formation and existence of the first agreement would apply *mutatis mutandis* to the second agreement. Accordingly, the court is of the view that the second agreement was lawfully and properly entered into by SP2 and SP3 on behalf of the appellant on 30 April 2012. Importantly, we note that there were no minutes of meetings of the JMC nor any resolution passed tendered in evidence to show that SP2 and SP3 were no longer authorised to enter into the second agreement.

(vii) The only record of any objections to the leasing of the premises was in the minutes of the fourth annual general meeting of the appellant held on 9 September 2012 where in para. 6.1 it was minuted as follows:

For record, the mandate of "Tidak Bersetuju" was unanimously adopted against the past JMC management over the leasing of the Club House premises to TOR (Timeout Resources Sdn Bhd). JMC will have to study the two contracts signed previously and to be follow(ed) up with COB, to consult MPAJ and seek legal advice. TOR issue is considered as top priority.

(viii) Apart from the above, no decision was taken or resolution passed to authorise the new office bearers of the Appellant and the JMC to withdraw from the second agreement and to terminate the same. It will be noted that the appellant's fourth AGM was held on 9 September 2012 ie, some five

A months after the second agreement had been entered into and that the respondent was presumably regular in its payment of rentals to the appellant.

Issue 2 – Whether The Appellant Was Obliged To Give A Letter Of
B *Support To The Respondent*

(i) For all intents and purposes the second agreement was a binding lease agreement between the appellant and the respondent.

C (ii) Although it is noted that there is no express provision in any of the terms of the agreements that the appellant was obliged to furnish a letter of support to the respondent to facilitate the respondent's application for a renewal of its Lesen Perniagaan for 2013, in our judgment we are of the view that
D at the very least, there was an implied obligation on the part of the appellant to do so. It is trite that parties to an agreement must do such acts as are necessary to preserve the integrity of the agreement and to ensure due performance of the agreement by all parties concerned. Here, it is not
E wholly unforeseeable that the refusal by the appellant to give its letter of support would delay and prejudice the respondent in its application. As events unfolded, the respondent was in fact unable to obtain a renewal of the license from MPAJ for 2013.

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(iii) Much was said by the appellant that there was no express or written request from MPAJ to the respondent or to the appellant for the latter's letter of support. We are of the view that nothing much turns on this, on whether there was a
G written request from MPAJ as it was in evidence that there were oral requests made by officers of MPAJ for the said letter.

(iv) In any event, the respondent themselves had most certainly requested in writing for the letter of support from the
H appellant, once on 18 July 2012 when the respondent's counsel wrote to the appellant and again on 3 December 2012 when the respondent wrote directly to Melvin Cheah, Chairman of the appellant (see rekod rayuan p. 476). There
I was no reason for the appellant to refrain from giving its letter of support if not for the singular intention to prevent the respondent from carrying on its lawful business at the

premises in 2013. The appellant wanted the respondent out and the appellant saw it as a golden opportunity to force a termination of the agreement. Quite obviously, the respondent, without having its licence to carry on business in 2013, would not be paying any rental to the appellant and it cannot be gainsaid then that the respondent was in breach of the agreement by failing to pay the rental as agreed.

(v) In any event it is a finding of the court that the requirement on the part of the appellant to furnish the letter of support to the respondent was a necessary corollary to the covenant undertaken by the respondent in cl. 6.1 of the second agreement. Clause 6.1 of the second agreement compels the respondent to obey and comply with all laws and requirements of the local authority including obtaining the necessary business licence for the Clubhouse Restaurant. It is thus implicit that the appellant must act in a manner to ensure the due performance of the contract by the respondent. It behoves the court to rule that the appellant was obliged to furnish the letter of support as the court should exercise its discretion to uphold conduct for the due performance of the contract rather than to cause its breach.

Issue 3 - Whether The Respondent Was In Breach Of The Agreement

(i) The respondent was obviously serious in its commitment to carry on business at the premises from 1 March 2012 as it had invested large sums of money, of about RM2 million, to renovate the premises. The renovations must have been carried out with the consent of the appellant as no action whatsoever was taken by anyone at any point in time to restrain the respondent from doing so.

(ii) Vacant possession was duly given to the respondent and in fact a rent-free period of two months was given to the respondent to carry out the renovations.

(iii) There does not seem to have been any proven breach or breaches committed by the respondent right up to 31 December 2012. The respondent had stopped paying rental to the appellant after it had failed to renew its Lesen Perniagaan for 2013 by reason of the appellant's failure to furnish the letter of support. Thus, the notice of termination dated 21 December 2012 by the appellant under cl. 10.1(a)

A and (b) of the second agreement and the claim for vacant possession in the said notice was not a proper and valid notice of termination of the lease.

Issue 4 - The Effect Of The Agreement Not Being A Registered Lease

B (i) Counsel for the appellant in his written submission submitted that "in essence the said agreement is a lease agreement in disguise". With respect, we fail to understand exactly what learned counsel meant to say by this submission.

C (ii) To the court, the agreement to let out the premises for the initial period of five years would come within the meaning of a lease in s. 221 of the National Land Code 1965, although the same was not registered. The lease was in favour of the respondent, a body capable of taking a lease within the D meaning of s. 43 and s. 433(B) of the National Land Code.

(iii) A lease however, will only have legal effect upon the registration of an instrument in Form 15A of the National Land Code. An unregistered lease, although void as a lease E and will not have the effect of vesting an interest in the lessee, is still good and valid as an agreement for a lease and is enforceable in equity by a decree of specific performance. (See *Margaret Chua v. Ho Swee Kiew & Ors* [1961] 1 LNS 61; [1961] 1 MLJ 173 CA)

F (iv) Thus, the court is of the view that the respondent was quite correct to pray for the enforcement of the agreement as an agreement for a lease by way of a decree of specific performance.

G **Appellant's Main Argument**

[25] We now return to consider the main argument of the appellant that is, s. 8(2) of the Act does not empower the appellant to enter into the agreement and therefore the agreement H is null and void. Counsel for the appellant reiterated that the powers of the JMB under s. 8(2) of the Act does not allow the appellant to enter into a lease agreement. While the duties of a JMB are set out in s. 8(1) of the Act, the powers of a JMB are provided for in s. 8(2). Section 8(2) of the Act reads as follows:

I (a) To collect from the purchasers maintenance and management charges in proportion to the allocated share units of their respective parcels;

(b) To authorise expenditure for the carrying out of the maintenance and management of the common property;

(c) To recover from any purchaser any sum expended by the Body in respect of that parcel in complying with any such notices or orders as are referred to under paragraph 1(e);

(d) To purchase, hire or otherwise acquire movable or immovable property for use by the purchasers in connection with their enjoyment of the common property;

(e) To arrange and secure services of any person or agent to undertake the maintenance and management of the common property of the building;

(f) To make house rules for the proper maintenance and management of the common property of the building; and

(g) To do all things reasonably necessary for the performance of its duties under this Act.

[26] Counsel for the appellant contended that paras. (a) to (f) do not grant the appellant the power to lease out the premises and that the appellant could not come within the scope of para. (g) which is "to do all things reasonably necessary for the performance of its duties under this Act" and accordingly the appellant does not have the power to enter into a lease of common property under the Act.

[27] The appellant contended that unlike s. 8(2)(d) where there is express power to "purchase, hire or otherwise acquire movable or unmovable property for use by the purchasers in connection with this enjoyment of the common property", there is no express power relating to the sale, leasing or renting out of common property.

[28] It is our considered view that the absence of any specific provision spelling out expressly the power to sell, lease or rent out common property in s. 8(2) of the Act, does not necessarily mean that a JMB does not have the power to do so. The power need not be express and it can be implied that the leasing out of common property by a JMB can come within the ambit of s. 8(2)(g).

[29] If, as is provided in s. 8(2)(d), a JMB can purchase, hire or acquire property, the court sees no reason why a JMB cannot do the converse provided of course, the sole objective is for the

benefit of residents and members of the JMB. In fact, in his speech and summary report at the appellant's fourth AGM held on 9 September 2012, the Chairman of the JMC had reported that the appellant had purchased two shop lots from the developer and that the two units were used as the management office and store respectively.

[30] In our present case, the appellant saw it fit in 2011/2012 to lease the premises to the respondent. The restaurant was open to members of the public and to members of the JMB. As such there was no deprivation of use of the restaurant by members of the JMB. The members not only had the benefit of the use of the restaurant but the JMB was also able to collect rental of at least RM9,000 per month from the respondent. The rentals collected would no doubt accrue for the benefit and enjoyment of the members of the JMB.

[31] It can be said that one of the main duties of a JMB as set out in s. 8(1) of the Act, is to look after the welfare of its members in their enjoyment of the common property. And it can be seen in s. 8(1)(i) of the Act that the appellant is generally authorised to do such other things as may be expedient or necessary for the proper maintenance and management of the buildings. Even with the lease of the premises granted to the respondent, members of the appellant were able to enjoy that part of the common property. Further, the rentals collected would no doubt be applied to reduce the maintenance and management charges due and payable by the members of the appellant. Thus, the leasing of the premises by the appellant was the doing of something reasonably necessary for the performance of its duties under the Act. The court is mindful of the fact that at the fourth AGM of the appellant, the house was unanimously opposed to the leasing of the Clubhouse premises by the "past JMC management". However, it is unfortunate that no reasons or explanations were given in support of the objection to enable the court to evaluate whether the leasing of the premises was reasonably unnecessary.

[32] The court has no issue with the submission of counsel for the appellant that the appellant being a creation by statute, the powers and duties are as provided by the statute that created it. (See *Majlis Peguam Malaysia & Ors v. Raja Sekaran Krishnan & Other Appeals* [2004] 4 CLJ 239). But as there is a general

provision in s. 8(2)(g) of the Act, the court sees no reason or basis to declare the agreement to lease out its common property null and void (see s. 66 of the Contracts Act 1950) for being *ultra vires* the Act. Recognising the power to sell, rent or lease common property is to enable or facilitate a JMB from performing its duties by doing things which are reasonably necessary. The implied power is to promote business efficacy in the maintenance and management of the common property belonging to the appellant.

[33] It is not uncommon for a JMB or a management corporation to lease out parking bays (as was done in this case) to its own members on a monthly or yearly basis. These leases of parking bays provide valuable income to the JMB or management corporation. If we are to go by the strict interpretation of the appellant, then either no one gets to use the parking bays or that the parking bays can be used for free. Now, surely either of the above propositions does not make commercial sense and cannot be supported as being reasonable.

[34] The court is mindful of the principle in company law that where the governing statutory provisions do not expressly or impliedly authorise or permit a thing then it is taken to be prohibited not by virtue of any express or implied statutory prohibition but by the doctrine of *ultra vires* (see *Malaysia Shipyard & Engineering Sdn Bhd v. Bank Kerjasama Rakyat (M) Bhd* [1985] 2 CLJ 427; [1985] CLJ (Rep) 206).

[35] Counsel for the appellant vexes the position that as the leasing of the premises is not expressly or impliedly authorised in s. 8(2) of the Act, then the agreement must be taken to the prohibited. (See *Halsbury's Laws of England,* 4th edn., vol. 9 at para. 1333). However, for reasons already stated above, the court is of the view that a JMB is impliedly authorised under s. 8(2)(g) of the Act to enter into a lease agreement. With respect, the court does not agree with counsel for the appellant that the operation of s. 8(2)(g) relates only to matters in the performance of duties by a JMB under s. 8(2)(a) to (i), which would be too strict and rigid an interpretation. The appellant as the JMB would still be able to manage and maintain the premises through the agreement. It will be incumbent upon the appellant to supervise the terms of the agreement in order to 'manage and maintain' the premises properly.

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Conclusion

[36] It will be noted that during the hearing of the appeal counsel for the appellant had only submitted against the order of the learned trial judge allowing the respondent's claim and did not pursue the appellant's appeal against the dismissal of the counter-claim.

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[37] In the result the court hereby dismisses the whole of the appellant's appeal with costs.

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